COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 13, 2003

APPLICATION OF

CPV WARREN, LLC

CASE NO. PUE-2002-00075

For a certificate of public convenience and necessity for electric generation facilities in Warren County, Virginia

FINAL ORDER

On February 4, 2002, CPV Warren, LLC ("CPV", "CPV Warren", or the "Company") filed an application in both confidential and public versions with the State Corporation Commission ("Commission") for approval pursuant to § 56-580 D of the Code of Virginia and the revised provision of 20 VAC 5-302-10 and -20 of the Virginia Administrative Code to construct, own, and operate a 520 MW combined cycle electric generating facility ("Facility") in Warren County, Virginia. As explained in the application, the Facility will interconnect on-site with a 500 kV transmission line owned by Dominion Virginia Power and a 138 kV transmission line owned by Allegheny Power Systems. The Facility will be powered by natural gas and will use low-sulfur distillate oil as a backup fuel for no more than 720 hours per year. CPV requested confidential treatment of commercially

sensitive information related to the Facility that CPV Warren deemed confidential.

On March 5, 2002, the Commission issued an Order docketing the matter, and setting forth the procedure under which confidential information could be accessed and used by Staff and parties to the proceeding.

On March 18, 2002, the Commission entered an Order scheduling a public hearing in the matter. The Commission required CPV to provide public notice of its application, provided interested persons with an opportunity to participate in the matter, established a procedural schedule for the filing of testimony, and assigned a Hearing Examiner to conduct further proceedings on the application. A public hearing was scheduled for July 24, 2002.

On April 15, 2002, Washington Gas Light Company ("WGL") filed its Notice of Participation herein. Further, in providing notice of this proceeding pursuant to the March 18, 2002 Order, CPV inadvertently served notice on Columbia Gas of Virginia, Inc., instead of Columbia Gas Transmission Corporation ("TCo"). CPV notified TCo of the proceeding on June 26, 2002, after the deadline for filing notices of participation had passed.

On July 12, 2002, TCo, by counsel, filed a Notice of Participation as a Respondent out of time. In its Notice of Participation, TCo represented that it would accept the record "as is", without further modification and that it was not

seeking to delay the procedural schedule for the proceeding. On July 16, 2002, CPV filed a "Motion in Support of Notice of Participation as a Respondent Out-of-Time," asserting that no parties would be prejudiced by permitting TCo to participate in granting the Company's motion. CPV's motion was granted by the July 17, 2002 Hearing Examiner's Ruling.

No comments from the public opposing the Facility were filed with the Commission by the June 14, 2002, deadline established by the March 18, 2002, Order for Notice and Hearing.

The Department of Environmental Quality ("DEQ") coordinated an environmental review of the application conducted by itself and other interested state agencies, the Northern Shenandoah Valley Regional Commission, and Warren County, Virginia. DEQ prepared a report on the potential impacts from construction and operation of the facility as well as recommendations for minimizing those impacts, which was filed on May 29, 2002 ("DEQ Report").

On June 26, 2002, the Commission Staff ("Staff") filed direct testimony regarding its analysis of CPV's application. The DEQ Report was attached to this testimony and was identified at Exhibit 10 in the proceeding. CPV filed rebuttal testimony on July 12, 2002.

An evidentiary hearing was convened as scheduled on July 24, 2002, before Hearing Examiner Alexander F. Skirpan, Jr. James R. Barrett, Esquire, George D. Cannon, Jr., Esquire, and

Cassandra Sturkie, Esquire, appeared on behalf of CPV. CPV presented the testimony of Thomas E. Eiden, CPV's Vice President for Project Development, Glen Harkness, President for TRC Environmental Corporation,[1] the supplemental testimony of Frederick M. Sellars, Vice President and National Director of Energy Facilities Permitting for TRC Environmental Corporation ("TRC"), and Harry Vidas, Vice President of Energy and Environmental Analysis, Inc. ("EEA").[2]

Sherry H. Bridewell, Esquire, and William H. Chambliss, Esquire, appeared on behalf of the Staff. Staff presented the testimony of Gregory L. Abbott of the Division of Energy Regulation, and Mary E. Owens and Mark Carsley of the Division of Economics and Finance. William Orndorff of the Department of Conservation and Recreation ("DCR"), Division of Natural

---

[1] Mr. Harkness' direct testimony was adopted by Mr. Eiden.

[2] On April 29, 2002, the Commission issued orders in three other certificate proceedings remanding those applications for, among other things, further consideration of cumulative air quality impacts. See Application of Mirant Danville, LLC, For approval of a certificate of public convenience and necessity pursuant to Va. Code § 56-265.2, an exemption from Chapter 10 of Title 56 and interim approval to make financial commitments and undertake preliminary construction work, Case No. PUE-2001-00430, Order (April 29, 2002); Application of CinCap Martinsville, LLC, For a certificate of public convenience and necessity for electric generation facilities in the City of Martinsville, Case No. PUE-2001-00169, Order (April 29, 2002); Application of Kinder Morgan Virginia, LLC, For approval of a certificate of public convenience and necessity pursuant to Va. Code § 56-265.2, an exemption from Chapter 10 of Title 56 and interim approval to make financial commitments and undertake preliminary construction work, Case No. PUE-2001-00423, Order (April 29, 2002).

To respond to the Commission's interest in developing a factual record regarding potential cumulative air quality impacts, CPV filed a motion on June 27, 2002, to supplement its application with the prefiled testimonies of Mr. Sellars and Mr. Vidas, responsive to the cumulative air quality impacts issue. CPV's unopposed motion was granted by the Hearing Examiner's July 17, 2002 Ruling.

Heritage, and Thomas F. Wilcox of the Virginia Department of Game and Inland Fisheries ("VDGIF" or "DGIF") appeared and presented testimony on the effect of the project on the Madison Cave Isopod.[3] In addition, Charles Turner, Director of DEQ's Office of Air Permit Programs, provided testimony on the effect of the project on air quality and testimony responsive to the testimony presented by Daniel R. Holmes, who appeared as a public witness on behalf of Piedmont Environmental Council ("PEC"). Neither TCo nor WGL appeared at the hearing.

Three public witnesses testified at the hearing, one of which opposed construction of the proposed facility. Richard Traezyk, a resident of Front Royal, testified that he was the Chairman of the Warren County Planning Commission at the time CPV presented its petition for local approval of the Facility. He testified that the Planning Commission unanimously voted to approve CPV's proposed Facility. He noted that he and the Planning Commission had conferred with professionals about the technical aspects of CPV's Facility and visited a similar facility in Hanover, Virginia, to observe its operations. Based on his research, Mr. Traezyk concluded that CPV's power generation facility was superior to coal-fired and nuclear power plants. Among other things, Mr. Traezyk testified that CPV's

[3] The Madison Cave Isopod (Antrolana Lira) is listed as threatened under both the United States and the Virginia Endangered Species Acts. Specimens of the Madison Cave Isopod have been identified on a parcel adjacent to the proposed site of the Facility ("Fishnet Ministries Site").

facility would benefit Warren County by contributing millions of dollars to that County's tax base, diversifying the County's businesses, and bringing high-skilled jobs to the community.

Douglas P. Stanley, a resident of Front Royal and the Warren County Administrator and planning director, appeared as a public witness in support of the proposed facility. He testified that the site, located in the middle of Warren County's industrial corridor, had been zoned for industrial use since 1977, and was "ideally suited" for CPV's facility because of its proximity to interstate gas lines and electric transmission lines. Mr. Stanley addressed the process by which Warren County officials evaluated and approved the conditional use permit ("CUP") for the proposed facility. He noted that both the Planning Commission and the Board of Supervisors unanimously approved the CUP, subject to 54 conditions.

On cross-examination, Mr. Stanley maintained that CPV's commitment to utilizing dry-cooling technology to reduce water consumption distinguished CPV's application from other potential power facility projects. Mr. Stanley confirmed that when the County officials approved the CUP they did not factor in the presence of the Madison Cave Isopod on the land near the facility's proposed site.

Daniel R. Holmes, Special Projects Coordinator for PEC, also appeared as a public witness. Among other things, Mr. Holmes' testimony focused primarily on the impact of the

Facility on air quality. Mr. Holmes raised the concern that Warren County was included within the U.S. Environmental Protection Agency's ("EPA's") presumptive boundaries for non-attainment with the eight-hour ozone standards as illustrated by a map he offered (Exhibit 1). He questioned whether CPV's commitment to obtain offsets of nitrogen oxide ("NO_x") emissions was possible and enforceable. He asserted that CPV should use lowest achievable emission rate ("LAER") technology rather than best available control technology at its proposed Facility. Mr. Holmes questioned whether DEQ had addressed Prevention of Significant Deterioration ("PSD") increments for the Facility and expressed concern as to the cumulative impacts of all proposed facilities. He expressed concern that Virginia's PSD program had not been subject to a periodic comprehensive review as prescribed by federal law.

Regarding CPV's commitments to Warren County, Mr. Holmes expressed concerns over whether CPV intends to operate the proposed facility and whether commitments made by CPV to Warren County would be enforceable if CPV sold the facility.

On cross-examination, Mr. Holmes clarified that two of the proposed plants shown on his map (Exhibit 1) purporting to identify preliminary ozone nonattainment areas, existing air quality monitoring and proposed power plants as of June 2001, should be removed because those projects have been withdrawn. Further, he explained that there was a dispute between DEQ and

EPA over the classification of Warren County, with DEQ holding that the County should not be considered as an area in non-attainment under the eight-hour ozone standard.

During the proceeding, CPV witness Eiden agreed to the recommendations made in the May 29, 2002, DEQ Report (Exhibit 10), subject to further discussions with DCR and VDGIF regarding the Madison Cave Isopod. Transcript at 114-115.[4] A late filed exhibit (Exhibit 8) was reserved for the Company to report on the status of its continued dialogue with DCR and VDGIF on this and stormwater runoff concerns. Tr. at 98-100. At the conclusion of the hearing, the Hearing Examiner accepted an offer by the Company and Staff to prepare a summary of the record in lieu of post-hearing briefs in the matter. Tr. at 215-216.

On October 15, 2002, CPV filed Exhibit 8, wherein the Company indicated that it had resolved all outstanding issues regarding the Madison Cave Isopod to the satisfaction of both VDGIF and DCR. In Exhibit 8, CPV committed to the following:

- Contribution To Help Fund Conservation Easement. DCR has expressed its interest in either developing a conservation easement over Madison Cave Isopod habitat located on a parcel currently owned by Fishnet Ministries, Inc., nearby the Project site, or purchasing the property. CPV, with DCR's concurrence, has agreed to contribute $47,250 toward a fund that will be administered by DCR to acquire the

[4] Hereafter references to the transcript will be to "Tr. at ____".

conservation easement or purchase the property.

- Contribution To Help Fund Monitoring. DGIF has recommended that CPV contribute toward a fund that would be used to monitor potential impacts to the Madison Cave Isopod resulting from the construction and operation of the Project. CPV, with DGIF's concurrence, has agreed to contribute $10,000 to a monitoring program developed by DGIF for this purpose.

- Stormwater Detention System. DGIF has recommended that the Project's stormwater detention system be designed to withstand a 100-year storm event. The Project's engineer has confirmed the Project's stormwater detention pond and landscaping plan are designed to withstand a 100-year storm event. CPV has further committed to enhance the design of the drainage ditches at the Project site.

On October 18, 2002, a Summary of the Record was filed jointly by Staff counsel and counsel for the Company.

On November 25, 2002, the Hearing Examiner entered a Report ("Report") summarizing the record and analyzing the evidence and issues in this proceeding. The Report made the following findings:

1. The Facility will have no material adverse effect upon the reliability of electric service provided by any regulated public utility;

2. The Facility advances the goal of electric competition in the Commonwealth;

3. The Facility will have no adverse effect upon the rates paid by customers for electric, natural gas, water, or

sewer service from any regulated public utility in the Commonwealth;

4. The Facility will have no material adverse effect on any threatened or endangered plant or animal species, any wetlands, air quality, water resources, or the environment generally;

5. The Facility will have a positive impact on economic development;

6. Construction and operation of the Facility will not be contrary to the public interest;

7. Any Certificate issued by the Commission in this case should include a requirement that CPV Warren report to the Clerk of the Commission the name and corporate affiliation of any company joining CPV as an equity partner, and the name and corporate affiliation of any company that purchases all or part of the capacity or output of the Facility on a long-term basis of six months or more;

8. Any Certificate issued by the Commission in this case should include a sunset provision that calls for the Certificate to expire if construction has not commenced within two years from the date of issuance;

9. Any Certificate issued by the Commission in this case should require CPV Warren to comply with all recommendations of the DEQ as agreed to by CPV Warren during this proceeding; and

10. Any Certificate issued by the Commission in this case should include a requirement for CPV Warren to meet its commitments with regard to the Madison Cave Isopod as set forth in Exhibit No. 8.

Based upon his findings, the Hearing Examiner recommended that the Commission: (i) grant CPV authority and a certificate of public convenience and necessity pursuant to § 56-580 D of the Code of Virginia to construct and operate an electric generation facility, and its associated facilities in Warren County as described in the Report and based upon the record developed in the proceeding; (ii) direct the Company to report to the Clerk of the Commission the name and corporate affiliation of any company joining CPV as an equity partner, and the name and corporate affiliation of any company that purchases all or part of the capacity or output of the Facility on a long-term basis of six months or more; (iii) provide that the certificate will sunset if construction has not begun within two years from the date of a Commission final order granting approval of the Facility; (iv) direct CPV Warren to comply with the recommendations of the DEQ as agreed to by CPV Warren during this proceeding; (v) direct CPV to meet its commitments with regard to the Madison Cave Isopod as set forth in Exhibit 8; (vi) provide that the certificate is conditioned on the receipt of all permits necessary to operate the Facility and direct the Company to provide a complete list of these permits to the Division of Energy Regulation; and (vii) dismiss the case from the Commission's docket of active proceedings.

The Hearing Examiner invited the parties to the proceeding to file written comments to the Report within twenty-one days

from the date of the Report, i.e., by December 16, 2002. Although no comments were filed by the parties to this case, the National Parks Conservation Association ("NPCA"), the Sierra Club, the Blue Ridge Environmental Defense League ("BREDL"), and PEC each registered concerns through written comments received by the Commission's Office of the Clerk on December 16, 2002.

On January 13, 2003, Douglas K. Morris, Superintendent of Shenandoah National Park, filed a letter in the Clerk's Office on behalf of the National Park Service. Mr. Morris filed this same letter on August 14, 2002. The letter stated that "[d]ue to significant unresolved issues surrounding the potential environmental impacts of this proposed power plant on the Class I Shenandoah National Park and . . . [PSD] increments, I request that the . . . [Commission] keep its Case No. PUE 2002-0075 (sic) file open until VA DEQ completes its PSD permit processing in consideration of our comments."

On December 27, 2002, the Commission Staff filed a "Motion to Receive Letter from Department of Environmental Quality into the Record" ("Motion"). This Motion noted that DEQ filed a letter, dated November 26, 2002 ("DEQ Letter"), in response to a Staff request pursuant to § 10.1-1186.2:1 C of the Code of Virginia. The DEQ Letter discussed the recommendations contained in the DEQ Report of May 29, 2002. The DEQ Letter stated that some of the recommendations in the DEQ Report pertain to matters that are not governed by permits or

approvals, some of the recommendations pertain to matters that could be or could have been made into permit conditions depending on the interaction between the agency making the recommendation and the permitting authority, and one recommendation may or may not appear in a permit condition.

Among other things, § 10.1-1186.2:1 C of the Code of Virginia requires that, prior to the close of the Commission's record on an application for certification of an electric generating facility pursuant to § 56-580 of the Code of Virginia, the DEQ shall provide the Commission with certain information about environmental issues identified during the DEQ's review process. The Motion indicated that in view of § 10.1-1186.2:1 C and the provisions of § 56-580 D, it was important to make the attached letter a part of the record to provide information relevant to agency approvals for the proposed Facility. Staff counsel represented that she was authorized to state that none of the parties to the proceeding opposed Staff's Motion, and that the next available exhibit number was Exhibit 18.

NOW THE COMMISSION, having considered the record, the pleadings, the Hearing Examiner's Report, and the applicable law, is of the opinion and finds that a certificate of public convenience and necessity to construct and operate the Facility should be granted to CPV Warren.

The Commission must decide this case on the evidence properly presented in the record. We will not consider the separate comments filed on December 16, 2002, by NPCA, the Sierra Club, BREDL, and PEC, all of which offer evidence and all of which were untimely filed.[5] We encourage the participation of these entities, and all interested persons or entities, in Commission proceedings. We must, however, ensure that our procedures remain fair to the applicant and to those who participate in accordance with the Commission's orders and regulations.

In this proceeding, adequate notice was provided and interested persons were afforded an opportunity to file written comments on the Company's application in a timely manner, to become parties to the case, or to appear as public witnesses. Our Order for Notice and Hearing, issued March 18, 2002, clearly explained that written comments could be filed on or before June 14, 2002, that persons desiring to participate in the case as a respondent needed to file a notice of participation[6] on or before May 22, 2002, and that any person not participating as a respondent could present oral testimony at the public hearing on July 24, 2002. In addition, as directed by the Commission, the

[5] We will not consider these comments as late-filed written comments or as responses to the Hearing Examiner's Report.

[6] A notice of participation simply needs to contain: (i) a precise statement of the interest of the respondent; (ii) a statement of the specific action sought to the extent then known; and (iii) the factual and legal basis for the action. Rule 5 VAC 5-20-80 B of the Commission's Rules of Practice and Procedure ("Rules").

Company published notice of this proceeding as display advertising in a newspaper or newspapers of general circulation in Warren County, which also set forth the above options in which to participate in this case.

Accordingly, interested persons or entities had three avenues through which to voice their views in this matter: (1) by filing written comments on or before June 14, 2002; (2) by filing a notice of participation and subsequently submitting evidence and/or pleadings as a party; or (3) by submitting evidence as a public witness. The Sierra Club, NPCA, BREDL, and PEC did not appear as parties (i.e., respondents) in this case or file comments by June 14, 2002. Further, the December 16, 2002, comments from these entities were submitted more than six months after the deadline for filing written comments, and subsequent to the evidentiary hearing and issuance of the Hearing Examiner's Report.

The procedures set forth above for participation require issues and evidence to be raised in a manner that permits the applicant and other parties an opportunity to address the same. The Sierra Club, NPCA, BREDL, and PEC did not provide any reason as to why their comments and evidence were not timely presented, why we should consider their comments and evidence out-of-time, or why consideration of their untimely comments and evidence would not unreasonably prejudice the applicant or other participants in the case. We do not find that accepting these

comments and evidence is necessary to serve the ends of justice in this proceeding. See Rule 5 VAC 5-20-10. If we accepted these filings in this case, we would need to provide the applicant, Staff, and DEQ an opportunity to reply and present evidence in response to material filed months after the deadline for presenting such comments and evidence and after the Hearing Examiner issued his Report. This could require the applicant to undergo another entire hearing process similar to what was concluded with the Hearing Examiner's Report in November of 2002. This is fundamentally unfair given the notice and earlier opportunities afforded these entities to participate.

In addition, we note that Mr. Holmes, Special Projects Coordinator for PEC, chose to participate as a public witness, not as a party.[7] The Commission's Rules state that "[p]ublic witnesses may not otherwise participate in the proceeding, be included in the service list, or be considered a party to the proceeding." Rule 5 VAC 5-20-80 C. Accordingly, Mr. Holmes' participation as a public witness does not provide a basis for us to consider PEC's comments and evidence of December 16, 2002, signed by Mr. Holmes, as a response to the Hearing Examiner's Report.

[7] The Commission's Rules permit a person to represent herself or himself in proceedings before the Commission. See Rule 5 VAC 5-20-20. As discussed above, a person desiring to become a party to this case simply had to file a notice of participation as a respondent, in accordance with Rule 5 VAC 5-20-80 B, on or before May 22, 2002.

As we have indicated in previous orders,[8] the Virginia Code establishes six general areas of analysis applicable to electric generating plant applications: (1) reliability;[9] (2) competition;[10] (3) rates;[11] (4) environment;[12] (5) economic development;[13] and (6) public interest.[14] We have evaluated the Facility according to these six areas.

We find that the Facility will have no material adverse effect upon reliability of electric service provided by any regulated public utility. We further find that the Facility is not otherwise contrary to the public interest in that, among other things, rates for the regulated public utility will not be impacted. In addition, we find that the Facility will provide economic benefits.

---

[8] See, e.g., Application of Tenaska Virginia II Partners, L.P., For approval of a certificate of public convenience and necessity pursuant to Va. Code (fn. 8 cont.) Section 56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work, Case No. PUE-2001-00429, Final Order at 6 and n. 3 (Jan. 9, 2003); Application of Old Dominion Electric Cooperative, For a certificate of public convenience and necessity for electric generation facilities in Louisa County, Case No. PUE-2001-00303, Final Order at 6 and n. 1 (July 17, 2002).

[9] Va. Code §§ 56-46.1 A and 56-580 D(i).

[10] Va. Code § 56-596 A.

[11] Va. Code § 56-580 D(ii). See also 20 VAC 5-302-20 14; Commonwealth of Virginia, At the relation of the State Corporation Commission, Ex Parte: In the matter of amending filing requirements for application to construct and operate electric generating facilities, Case Nos. PUE-2001-00313 and PUE-2001-00665, Order Adopting Rules and Prescribing Additional Notice, 2001 S.C.C. Ann. Rep. 585, 586 (Dec. 14, 2001).

[12] Va. Code §§ 56-46.1 A and 56-580 D.

[13] Va. Code §§ 56-46.1 and 56-596 A.

[14] Va. Code § 56-580 D(ii).

Pursuant to §§ 56-46.1 and 56-580 D of the Code of Virginia, we have given consideration to the effect of the Facility on the environment. During the hearing, Charles Turner, Director of the Office of Air Permit Programs for DEQ, testified on the status of CPV's PSD application:

> This particular facility has submitted an application to us. However, we have not completed a draft permit. And right now, relative to the modeling requirements for this facility, the Class I analysis modeling protocol has only recently been agreed upon. So we have not seen that. We have not received their modeling analysis for the Class II areas either. At this time, we cannot state what the specific standard would be. We can make speculation, but the permit won't be finalized until we receive -- see the results of that modeling and know that the emissions levels do not allow for a violation of the NAAQS standard.

Tr. at 157.

Sections 56-580 D and 56-46.1 A of the Virginia Code direct us to give consideration to the effect of the proposed Facility "on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact." In this regard, however, the 2002 General Assembly passed legislation to amend §§ 56-580 D and 56-46.1 of the Code of Virginia “to avoid duplication of governmental activities” effective July 1, 2002. These statutes provide, among other things, that any valid permit or approval regulating environmental impact and mitigation of adverse environmental impact, "whether such permit or approval is granted prior to or

after the Commission's decision," shall be deemed to satisfy the requirements of §§ 56-46.1 A and 56-580 D of the Code of Virginia "with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matters."

CPV Warren has agreed to implement all of the recommendations contained in the May 29, 2002, DEQ Report (Exhibit 10), as modified by Exhibit 8, as a condition of its certificate from the Commission.[15] The record in this case does not establish that any of the recommendations in the DEQ Report: (1) are governed by a permit or approval issued by a governmental entity; or (2) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval.[16] Accordingly, as agreed to by CPV Warren, we will require the Company to comply with the DEQ recommendations in Exhibit 10, as modified by Exhibit 8.

Further, the Commission will condition the certificate granted herein upon the Company's receipt of all environmental and other permits necessary to construct and operate the Facility. We also will provide that the certificate will expire

[15] See Exhibit 10 at 2-3; Report at 56; Motion at 4. As noted above, the Company reached an agreement with VDGIF and DCR on the DEQ recommendation addressing the Madison Cave Isopod (Exhibit 8).

[16] Consistent with § 10.1-1186.2:1 C of the Virginia Code, we will grant Staff's Motion and accept the DEQ Letter of November 26, 2002, as Exhibit 18.

two years from the date of this Order if construction on the Facility has not commenced.

Finally, we must deny the request of Superintendent Morris of the Shenandoah National Park to keep this case open until DEQ completes its PSD permitting process. Mr. Morris's concerns involve matters that are within the authority of, and are being considered by, DEQ in the PSD permitting process. Thus, in accordance with § 56-580 D of the Virginia Code, the matters of concern to Mr. Morris must be addressed by the DEQ, not by this Commission.

Accordingly, IT IS ORDERED THAT:

(1) Pursuant to § 56-580 D of the Code of Virginia, in accordance with the record developed herein, CPV Warren is hereby granted authority and a certificate of public convenience and necessity to construct and operate the Facility described in this proceeding.

(2) The certificate granted herein shall be conditioned upon the receipt of all environmental and other permits necessary to construct and operate the Facility.

(3) As a condition of the certificate granted herein and as agreed to by CPV Warren in this proceeding, CPV Warren shall comply with the recommendations made by the DEQ in Exhibit 10, as modified by the commitments set forth in Exhibit 8.

(4) The certificate granted herein shall expire in two years from the date of this Order, if construction of the Facility has not commenced.

(5) Staff's December 27, 2002, "Motion to Receive Letter from Department of Environmental Quality into the Record" is granted, and the November 26, 2002, letter from DEQ attached to that Motion will be received as Exhibit 18.

(6) There being nothing further to come before the Commission in this proceeding, this case shall be removed from the docket and the papers transferred to the file for ended causes.

MOORE, Commissioner, Concurs:

Given the statutory change effective July 1, 2002, I must concur with my colleagues in the decision to approve construction and operation of the proposed facility. I do so because the issues that would cause me to deny the application without further data and analysis are within the jurisdiction of the DEQ and other agencies rather than this Commission.

I write separately to express my continued concern and mounting alarm at the apparent failure of the Commonwealth to address adequately the impact of power plants on the environment of the Commonwealth.[1] This case is of particular concern because the proposed facility is within five miles of the Shenandoah National Park, a Class I area. While it may be laudable that the applicant has agreed to NO_x offsets that may leave the area

[1] Examples of areas where, based on the record before the Commission, additional analysis and study should be required are discussed in my prior concurrences and dissents. See Commissioner Moore concurrence, Application of Old Dominion Electric Cooperative, For approval of a certificate of public convenience and necessity for electric generating facilities, Case No. PUE-2002-00003, Final Order (November 6, 2002); Commissioner Moore concurrence, Application of CPV Cunningham Creek LLC, For approval of a certificate of public convenience and necessity pursuant to Va. Code § 56-265.2, for an exemption from Chapter 10 of Title 56, and for the interim authority to make financial expenditures, Case No. PUE-2001-00477, Final Order (October 7, 2002); Commissioner Moore concurrence, Application of Old Dominion Electric Cooperative, For a certificate of public convenience and necessity for electric generation facilities in Louisa County, Case No. PUE-2001-00303, Final Order (July 17, 2002); Commissioner Moore dissent, Application of Buchanan Generation, LCC, For permission to construct and operate an electrical generating facility, Case No. PUE-2001-00657, Final Order (June 25, 2002) ("Buchanan, Moore dissent"); Commissioner Moore dissent, Application of Tenaska Virginia Partners, L.P., For approval of a certificate of public convenience and necessity pursuant to Virginia Code § 56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work, Case No. PUE-2001-00039, Final Order (April 19, 2002) ("Tenaska, Moore dissent").

in no worse condition than it is now, the fact remains that a major new power plant may be allowed to be constructed in an extremely sensitive area without adequate analysis and review.[2] At least two areas should raise serious questions, ozone[3] and fine particulate matter.[4]

---

[2] There was no evidence cited by the Hearing Examiner or that I could find in the record that the actual NO_x "offsets" would, in fact, offset the impact of the NO_x emissions of the proposed facility on the air quality in the Class I area.

[3] With respect to ozone, the applicant appeared to acknowledge that how close a concentration level may be to the NAAQS is important in assessing the impact of additional pollution concentrations. Exhibit 13 at p. 27. This is particularly critical for ozone where there is no safe level. Tenaska, Moore dissent at pp. 6-7. In this proceeding, however, the Company describes an ozone concentration of 109 ppb as "well below the 1-hour ozone standard of 120 ppb." Exhibit 13, Attached Exhibit 6, at p. 3-11. A concentration of 91% of the allowable NAAQS should not be described as "well below" the limit for a pollutant that has no safe level.

Also, with respect to ozone levels in Warren County, there appears to be a dispute between the DEQ and the EPA as to whether Warren County will have a "non-attainment" designation under the new eight-hour ozone standard. Tr. at 41, 51-56; Exhibit 13 at pp. 11-12. While Mr. Sellars stated the area was within attainment limits, he failed to provide data with respect to the new eight-hour standard. The Company's failure to provide these data means we do not know how close Warren County is to the new, lower eight-hour standard. Under the less stringent one-hour standard, according to the Company, the ozone level in Warren County is already at more than 85% of the NAAQS. As noted in my dissent in Buchanan, exceedances under the eight-hour standard were more that 15 times greater (783 compared to 50) than under the one-hour standard for the 1996-2000 period. Buchanan, Moore dissent at 3-4. It could be that Warren County is above or just below the non-attainment level under the new standard. Again, this is alarming because there is no "safe" level of ozone.

[4] In response to my concern about fine particulate matter, specifically, $PM_{2.5}$, Mr. Sellars states that maximum annual concentration data available for Virginia indicate a range of between 12 and 15.1 $\mu g/m^3$ as compared to the $PM_{2.5}$ NAAQS of 15 $\mu g/m^3$. Mr. Sellars states that Warren County should be "represented by monitors falling in the middle of the 12 to 15.1 $\mu g/m^3$ spectrum . . . ." Exhibit 13 at p. 29. There was no explanation by Mr. Sellars of why we should not be concerned when $PM_{2.5}$ concentrations in the area in question are, by his estimate, already approximately 90% of the NAAQS. This is particularly alarming since there is no "safe" level of particulate matter. Tenaska, Moore dissent at p. 10.

Applicants before the Commission continue to maintain that if the current NAAQS standard is not exceeded, the plant should be approved. No consideration appears to be given to how close the current pollution level is to the limit or the impact of EPA's revised limits that will be implemented over the next few years. The DEQ must go beyond the data and platitudes presented to this Commission,[5] and ensure that Virginia, her citizens and environment are protected.

[5] Indeed, to the extent certain issues are beyond the jurisdiction of this Commission as a result of the July 1, 2002, amendments to the Virginia Code, it would not appear necessary for the applicant to present evidence on these issues. While this case was filed before July 1, 2002, future applicants may want to consider whether presentations on matters not before the Commission should be included in their applications.